No. 280

In the Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC., PETITIONER

vs.

OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD and DRUG ADMINISTRATION, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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It is respectfully submitted that respondents in their Brief in Opposition have misrepresented the facts and law to the prejudice of petitioner. Illustrative examples will be cited.

CONFLICTING STATEMENTS OF THE CASE

1. On the first full page thereof, respondents state that:

> "* * * the War Production Board *decided* that there was wastage of tin plate in oyster canning because of the light 5-ounce fill." (Br. Opp. 5)

The War Production Board "decided" no such thing. It held no hearing. It rendered no decision. It issued only its fiat or order (appropriately enough during war time) to "conserve tin" by restricting tin plate to those who could pack oysters to a 7½ ounce fill. This excluded petitioner and other Western packers and imposed hardship on

Southern packers (R. Vol. III, 46, 204, 403, 453-5, 554-5). If such was a "decision," even the respondents have since repudiated it by the instant 1948 orders, which find that a 6½ ounce fill (and not 7½ ounces) is in "the interest of consumers" (R. Vol. I, 44-5).

2. Again, respondents state that their 1944 order was "*largely* inapplicable" to Pacific or Western oysters (Br. Opp. 6). The truth is the 1944 order was by its terms *specifically* inapplicable to Western oysters (R. Vol. I, 48-9, 50-1).

3. Again, respondents state that the 1948 order:

> "contained detailed findings of fact." (Br. Opp. 7)

This indeed is true, but in reciting the findings respondents lift themselves by their bootstraps by iteration and reiteration of the very "findings" that have been challenged herein as being prepared in a partisan manner for the respondent Administrator's signature:

> "by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents * * * to know the claims thus presented and to contest them. *That is more than an irregularity in practice; it is a vital defect.*" (*Morgan v. United States*, 304 U.S. 1, 22 (1938).

4. Again, having thus lifted themselves by their bootstraps, respondents incorrectly state that:

> "The Administrator '*concluded*' that it would not promote honesty and fair dealing in the interest of consumers to return to the 5-ounce fill; * * *." (Br. Opp. 8)

That is the very issue in the case. Petitioner has alleged and offered to prove throughout this case that the Administrator "concluded" no such thing, but that *per contra*, the government enforcement officer and witness

Callaway, and the government attorney Goodrich (now one of the signatories to respondents' instant Brief in Opposition), were the persons who so "concluded" after an "*ex parte* discussion" with the Administrator and "without according any reasonable opportunity" to petitioner "to know the claims thus presented, and to contest them."

In their Brief, respondents virtually concede these unlawful acts. But respondents contend that the Federal Food, Drug and Cosmetic Act:

> "does not preclude consultation between the Administrator and subordinate personnel in food standards proceedings, and the due process clause implies no such prohibition." (Br. Opp. 17)

Thus, the respondents ignore the basic rudiments of fair play prescribed by the second *Morgan* case, 304 U.S. 1, *passim, supra,* and cases cited therein.

5. Again, respondents assert that the findings of fact and conclusions "made" by the Acting Administrator in the second 1948 order are the basis upon which he "concluded" that it would not promote honesty and fair dealing to permit a separate standard for blanched Western oysters (Br. Opp. 11, 12). But such "findings" prepared *ex parte* in consultation with the prosecutor and prosecuting witness are not the requisite findings of fact made with:

> "that dispassionate judgment which Anglo-American tradition demands of officials who decide questions"[1]

These private views of the investigative and enforcement officials and of the agency's attorneys should have been presented publicly and not privately to those who decide. *Morgan v. United States, supra,* 304 U.S. at 22.

6. Respondents next cite without direct quotation various

[1]Administrative Procedure in Government Agencies (1941) Sen. Doc. 8, 77th Cong., 1st Sess. 56.

pages of the Court of Appeals' opinion, and thereafter quote a subsequent portion thereof (Br. Opp. 13). It is respectfully submitted that any objective reading of the opinion of the Court of Appeals will confirm that that Court entertained grave doubts as to the validity of the challenged orders, but felt constrained by their interpretation of this Court's substantive evidence rules to affirm a portion of the order. For example, the Court said:

> "The Administrator found, and there was evidence tending to show, that the eleven ounce can *could* be filled to yield 6½ ounces net drained weight (by filling the can to approximately 9 ounces) by the use of the blanching method without a substantial increase in the incidence of the above mentioned detractive features."

* * * * * * * * * * *

and:

> "Even though *we* might feel that petitioner's evidence was the more convincing, and *we* might have concluded differently, the evidence considered in its entirety, is clearly sufficient to support the findings made." (Emphasis in Court's text) (174 F.(2d) at 688, 689)

The fundamental error in the Court of Appeals' opinion and decree was its reliance on such "findings" prepared *ex parte* by the government's active prosecutors and witnesses who "sifted in" portions of the evidence favorable to them and "sifted out" and totally disregarded other opposing and equally persuasive evidence.

7. Again, respondents seek to justify the orders by asserting that:

> "No amount of argument can successfully refute the proposition that * * * the person who buys a can of oysters * * * weigh(ing) 11 ounces actually receives only 5 ounces of oyster meat." (Br. Opp. 15-16)

It is submitted that such an argument is not properly in

opposition to a Petition for Certiorari, but to the merits, when thereafter reached. A considerable "amount of argument" may be validly considered at that time to refute respondents' asserted "proposition," *e. g.*:

> *First,* the asserted "proposition" ignores the fact that it is respondents who fixed a fill of 6½ ounces of oyster meat in an 11 ounce can. Therefore, there must be great merit in the contention that the quantity of oyster meat (whether 5, 6½ or 7½ ounces) under any circumstances is considerably lower than the weight of the can. *The critical question is whether there has been a fair determination* of *whatever* quantity is fixed — the difference between 5 ounces and 6½ ounces is a 30% increase; that between 5 and 7½ ounces is 50%.
>
> *Second,* respondents' asserted "proposition" ignores substantial evidence that the remaining ounces in the can are not "water," as they allege (Br. Opp. 12), but under petitioner's "blanching" process consists of oyster nectar containing a high value of food content (R. Vol. VII, Ex. 30). But respondents seek to lift themselves by their bootstraps by relying on the same self-serving "findings" prepared by the prosecutors and which deprecate the scientific evidence offered by petitioner to establish the high nutritive food value of the surrounding liquid.

8. Again, respondents beg the fundamental question in this case by asserting that:

> "The proceeding before the Administrator was not quasi-judicial in character." (Br. Opp. 16)

The term "quasi-judicial" is elusive. If by "quasi-judicial" respondents mean an adjudication solely of a past controversy, respondents would be correct in contending that this proceeding is not quasi-judicial. But if by the term "quasi-judicial," respondents mean a proceeding "as if," or similar to, that of a judicial tribunal whose find-

ings are made objectively by a non-biased court and solely on the basis of evidence offered at a public hearing, then most assuredly the challenged proceedings are "quasi-judicial." *Chicago Junction* case, 264 U.S. 258, 264-5 (1924); *Powell v. United States,* 300 U.S. 276, 285 (1937).

9. Again, respondents erroneously allege that petitioner has asserted:

> "some sort of *vested right* to continue a 5 ounce fill." (Br. Opp. 15)

This likewise is wholly false. Petitioner has never asserted such a claim, or anything resembling it.

The only "vested right" that petitioner claims is that requisite findings be made in accordance with law, and the "basic rudiments of fair play," preserving the "inexorable safeguard which the due process clause assures • • • that the trier of the facts shall be an impartial tribunal." *Morgan v. United States,* 304 U.S. 1, 22 (1938); *Carter v. Kubler,* 320 U.S. 243, 247 (1943); *St. Joseph Stock Yards v. U.S.,* 298 U.S. 38, 73 (1936).

10. Respondents erroneously assert that the second *Morgan* case, *supra,* was not "ignored" by the Court of Appeals (Br. Opp. 18). But a careful examination of that Court's opinion shows that no reference is made to the controlling principles of that case, nor is there any citation or reference to it. Respondents' contention is unfounded, and rests only on its own sweeping and self-serving denial.

11. Respondents next brush aside three conflicting decisions of other Courts of Appeal with but a sweeping footnote conclusion that they are "inapposite" (Br. Opp. 21). It is submitted the conflicting opinions must speak for themselves and that any fair reading rebuts such contentions by respondents.

12. Lastly, respondents cite from the opinion of the Court of Appeals (Br. Opp. 25) to the effect that petitioner's arguments are supported only by reference to Congressional "hearings" (174 F.(2d) at 693). This statement by the Court of Appeals is in error. It was not on the basis of "*hearings,*" but on the basis of the *same* committee *reports* which respondents cite in their own immediately preceding paragraph (Br. Opp. 25) that petitioner has consistently relied (R. Vol. XII, 22-34); S. Rep. 752, 79th Cong., 1st Sess., p. 18; H. Rep. 1980, 79th Cong., 2d Sess., p. 30 (being the *same* reports and *identical* page references cited by respondents).

And the Chairman of the Senate Committee in reporting the bill to the Senate (which thereafter passed unanimously) stated:

> "The exemption of rule making and determining applications for licenses, from provisions of sections 5(c), 7(c), and 8(a) may require change if, in practice, it develops that they are too broad. The committee believes it has followed sound discretion in selection of the language used, and *it is the feeling of the committee that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions.*"[2]

ARGUMENT

The fundamental question is whether "*fair procedure*" is required under the Constitution and under the Administrative Procedure Act and Federal Food, Drug and Cosmetic Act, where the findings resolve "sharply controverted factual issues."

Or, stated conversely: Is a court having jurisdiction to

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[2]Administrative Procedure Act, Legislative History (1947) 79th Cong. 2d. Sess. S. Doc. 248, pp. 324-5.

review, powerless to act to protect a litigant who is the victim of "unfair procedure"?

The Court of Appeals found that one of the two major portions of the Administrator's order was:

> "extremely *arbitrary, capricious* and *unreasonable* when examined in the light and against the background of the order's entire effect." (R. Vol. XI, p. 31).

and

> "*outside the bounds of reason and fairness* * * * (and) * * * *manifestly unfair* to that portion of the industry discriminated against, and to that extent we regard the requirement as *arbitrary, capricious* and an *abuse of discretion.*" (R. Vol. XI, p. 32) 174 F. 2d at 699

It is most earnestly urged, in the light of the utter condemnation by the Court of Appeals of a substantial portion of respondents' orders, and in the light of the earnest contentions herein that the basic rudiments of fair play were mutilated and destroyed by respondents' procedure, that the entire case calls for an exercise of this Court's power of supervision.

The critical difficulty is the total absence of a fair and objective method by which respondents seek to evaluate conflicting evidence. If this be lawful, then the elaborate Congressional provisions for quasi-judicial hearings in food and drug matters are empty and meaningless, and afford no protection whatever to citizens adversely affected.

We can conclude no better than by requoting the two concluding paragraphs of the Petition for Certiorari:

> "If there be no constitutional and statutory prohibition against the adverse government witness subsequently preparing *ex parte* the finding, which 'invariably' *write up* the government evidence and 'consistently' *write down* the private citizen's evidence,

then the elaborate statutory requirements for hearings based on evidence are set at naught, and safeguards of judicial review become a mirage.

"It is earnestly submitted that the lower court's opinion and decree does more than hurt this petitioner. It hurts good government, and the confidence of citizens in it. It can so easily be avoided by a judicial decision by this court which permits the Administrator to employ 'competent subordinates' who are unbiased to aid him in digesting conflicting testimony and preparing appropriate findings. It is only required to exclude from the ranks of such 'competent subordinates' the government's witnesses and attorneys who had 'buried themselves in one side' of an adverse proceeding by testifying, advocating, and preparing one side of a sharply controverted dispute." (Pet. Certiorari, 40-1)

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Dated at Seattle, Washington, October 14, 1949.

Respectfully submitted,

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